BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROYCE SIRMANS Claimant VS. **WOODLAWN NURSING HOME** Respondent AND **KANSAS HEALTH CARE ASSOCIATION** Insurance Carrier	)	Docket No. 168,432

ORDER

ON the 10th day of March, 1994, the applications of the claimant and the respondent for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Shannon S. Krysl, dated December 23, 1993, came on for oral argument.

APPEARANCES

The claimant appeared by and through his attorney, Chris Clements of Wichita, Kansas. The respondent and its insurance carrier appeared by and through their attorney, Kirby A. Vernon of Wichita, Kansas. There were no other appearances.

RECORD

The record as specifically set forth in the Award of the Administrative Law Judge, dated December 23, 1993, is herein adopted by the Appeals Board.

STIPULATIONS

The stipulations as specifically set forth in the Award of the Administrative Law Judge, dated December 23, 1993, are herein adopted by the Appeals Board.

ISSUES

Administrative Law Judge Shannon S. Krysl, in her Award dated December 23, 1993, awarded the claimant a five percent (5%) permanent partial general disability based

on functional impairment. Both the claimant and respondent have requested review of this Award by the Appeals Board as to the appropriateness of the Award on the single issue of nature and extent of the claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record and the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

The claimant takes the position that he has established by a preponderance of the credible evidence that he is entitled to a work disability award. The respondent, on the other hand, argues that the appropriate award should be permanent partial general disability based on functional impairment only. Both parties agree that if work disability is not determined to be the appropriate award in this case, that an award for permanent partial general disability based on functional impairment should be limited to two and one-half percent (2.5%) instead of the five percent (5%) awarded by Administrative Law Judge Shannon S. Krysl. The parties stipulated to this two and one-half percent (2.5%) functional impairment and such stipulation is noted in Administrative Law Judge Shannon S. Krysl's Award dated December 23, 1993. The stipulation also was confirmed by both of the parties during oral argument before the Appeals Board.

In the present case, the claimant commenced working for the respondent in the position of a maintenance/janitor on December 13, 1990. The claimant and John Wills, owner and administrator of Woodlawn Nursing Home, both testified in this case and both gave different versions concerning the actual job duties that the claimant was required to complete before and after the work-related injury he received on July 4, 1992. Prior to his injury, the claimant claims he supervised some four (4) employees and Mr. Wills contends that he supervised only one (1) employee. Claimant indicates he was required to lift over one-hundred and fifty (150) pounds on an occasional basis which he determines as forty to sixty (40-60) times per year. Mr. Wills testifies that it would be unlikely for claimant to have an occasion to lift this amount of weight. Mr. Wills contends that if claimant had to lift something that heavy, there would have been someone available to assist him. In regard to the claimant's maintenance responsibilities, claimant testifies that he was required to perform whatever was needed prior to calling for outside maintenance help.

In performing his job duties for the respondent, the claimant, on July 4, 1992, injured his low back when a seven to eight (7-8) foot wooden ladder fell on his back as he was bent over pulling out a mop bucket. He immediately reported the accident to the respondent. The respondent referred him for medical treatment to the Wichita Clinic. Robert Van Gallera, M.D., board certified in family practice and employed by the Wichita Clinic, first treated claimant on July 7, 1992. Dr. Van Gallera performed a physical examination and found mild tenderness in the claimant's low back with no nerve injury or muscle spasm. It was his impression that the claimant had suffered a contusion or bruise of the low back as a result of his accident. Dr. Van Gallera treated the claimant on four (4) occasions in July 1992, prescribing anti-inflammatory medication, ice or heat, physical therapy and stretching exercises. He returned the claimant to regular work on July 15, 1992. However, the claimant returned to Dr. Van Gallera on July 20, 1992, with continuing complaints of low back pain described as a burning or warming sensation. Dr. Van Gallera finally referred the claimant to Robert L. Eyster, M.D., an orthopedic surgeon with Orthopedic and Sports Medicine of Wichita, Inc.

The claimant was first examined by Dr. Eyster on August 19, 1992, and his first impression was early bulging disc from degenerative disc disease. He prescribed pain medication, exercises, physical therapy and had the claimant remain off work. The claimant was released for regular work by Dr. Eyster on October 7, 1992, with restrictions to be careful with bending and not to work in a bent over position for long periods of time. The record indicates that the claimant did return to work for the respondent on October 26, 1992. Dr. Eyster followed the claimant until April 14, 1993, providing conservative treatment including a work-hardening program. Dr. Eyster's final diagnosis was lower back strain instead of the original bulging disc diagnosis, as an MRI was completed on January 8, 1993, with normal results. Degenerative disc disease was found but Dr. Eyster was of the opinion that the disc disease was not aggravated by the claimant's work-related accident. Permanent restrictions were imposed of no lifting over seventy-five (75) pounds, no repetitive lifting over thirty-five to forty (35-40) pounds, and no excessive bending or twisting. These restrictions were imposed because of the claimant's subjective complaints and to protect him from further injury as a result of the underlying degenerative disc disease. No permanent impairment was assessed to the claimant as Dr. Eyster concluded that the accidental injury did not aggravate the degenerative disc disease.

Ernest R. Schlachter, M.D., of Wichita, Kansas, at the request of claimant's attorney, examined and evaluated the claimant in reference to permanent functional impairment and permanent restrictions. Dr. Schlachter saw the claimant only one time on July 19, 1993. At the time of the examination, Dr. Schlachter had the benefit of previous x-rays and MRI reports, a functional capacity evaluation and Dr. Eyster's records. Based on the claimant's subjective complaints, Dr. Schlachter found chronic lumbar sprain consistent with the accidental injury the claimant sustained while employed by the respondent. In accordance with the American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition, Revised, and his years of experience in performing impairment evaluations, Dr. Schlachter's opinion of the claimant's permanent impairment of function of the body as a whole in regard to claimant's accidental injury was five percent (5%). Permanent restrictions were imposed of no single lift of more than forty-five (45) pounds, no repetitive lift of more than thirty-five (35) pounds and no repetitive bending, twisting or working in awkward positions.

At this point, the evidentiary record is conflicting as it relates to whether the claimant had the ability to perform the requirements of his job when he returned to work for the respondent in October 1992 following his work-related injury. Dr. Eyster released the claimant to resume his regular employment after his visit of October 7, 1992. Mr. Wills, the respondent's owner, testified that claimant returned to work on October 26, 1992, at the same rate of pay as he was earning on the date of his accident. Claimant worked for the respondent until he was terminated on November 14, 1992. Mr. Wills contends that the claimant was terminated for reasons that he refused to carry a pager, would not work at night, and that his attitude and overall work performance had deteriorated during this period of time. Claimant testified that he was terminated because of reduction in workforce. Both agree that his job duties after he returned to work involved more janitorial duties than prior to his injury. However, claimant concludes that he had to work outside his work restrictions in that his new job duties required him to lift in excess of seventy-five (75) pounds and to repetitively bend and twist. Mr. Wills testified that after the claimant returned to work he was not required to lift over seventy-five (75) pounds nor was he required to perform any repetitive activities.

With respect to the work disability issue, the Administrative Law Judge found that the claimant failed to meet his burden of proving work disability. Through the testimony of Mr. Wills, the respondent's owner, the evidence has established that the job the claimant returned to after his accidental injury was within the medical restrictions of Dr. Eyster, the claimant's treating physician and the job paid a comparable wage. In fact, it is Dr. Eyster's conclusion that the medical restrictions placed upon the claimant are not the result of the claimant's accidental injury but are a result of claimant's prior degenerative disc disease. The claimant performed the required work activities and was terminated by the respondent for reasons unrelated to his physical condition. The Administrative Law Judge in the instant case had the opportunity to judge the claimant's demeanor and credibility while he was testifying at the regular hearing. As the evidentiary record is conflicting in regard to the work disability issue, the Appeals Board takes into consideration the Administrative Law Judge's opportunity to observe the claimant and affirms the Administrative Law Judge's finding in reference to work disability. See e.g., Kroger Co. v. Morris, 14 Va. App. 233, 415 S.E.2d 879 (1992). As the claimant was returned to a job with the respondent at a comparable wage and was subsequently terminated for cause unrelated to his work-connected injury, the presumption of no work disability has not been rebutted. K.S.A. 1991 Supp. 44-510e(a).

Since the claimant is not entitled to an award of work disability, any permanent partial general disability is limited to the percentage of functional impairment. See Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 196, 558 P.2d 146 (1976); Perez v. IBP, Inc., 16 Kan. App. 2d 277, 278, 826 P.2d 520 (1991). Accordingly, any discussion of opinions expressed by Jerry Hardin, Human Resource Consultant, on the issue of work disability is unnecessary.

The Administrative Law Judge found that the claimant was entitled to a five percent (5%) permanent partial general disability based on the opinion of Dr. Schlachter. However, as previously mentioned, the parties to this case stipulated to a finding that the claimant's functional impairment as a result of his work-related injury amounted to two and one-half percent (2.5%) of the whole body. Therefore, the Appeals Board finds and concludes, in accordance with this stipulation, that claimant is entitled to a two and one-half percent (2.5%) permanent partial general disability based on functional impairment.

As nature and extent of claimant's disability was the only issue presented to the Appeals Board for review in this matter, all other findings of Administrative Law Judge Shannon S. Krysl as set forth in her Award of December 23, 1993, are herein adopted and incorporated by the Appeals Board to the extent that they are not inconsistent with the findings and conclusions expressed in this Order.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Shannon S. Krysl, dated December 23, 1993, is hereby modified and an award is entered as follows:

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY ENTERED IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR OF the claimant, Royce Sirmans, and against the respondent, Woodlawn Nursing Home, and its insurance carrier, Kansas Health Care Association, for an accidental injury sustained on July 4, 1992, and based upon an average weekly wage of $326.00.

Claimant is entitled to 9 weeks of temporary total disability benefits at the rate of $217.34 per week or $1,956.06, followed by a payment of $5.43 per week for 406 weeks or $2,204.58, for a two and one-half percent (2.5%) permanent partial general disability, making a total award of $4,160.64.

As of September 2, 1994, there is due and owing the claimant 9 weeks of temporary total disability compensation at $217.34 per week or $1,956.06, plus permanent partial general disability compensation at $5.43 per week for 103.86 weeks in the sum of $563.96 for a total due and owing of $2,520.02, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $1,640.62 shall be paid at $5.43 per week for 302.14 weeks until fully paid or until further order of the Director of Kansas Workers Compensation.

IT IS SO ORDERED.

Dated this ____ day of September, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris Clements, 1861 N. Rock Road, Suite 320, Wichita, KS 67206
Kirby A. Vernon, 301 N. Main, Suite 600, Wichita, KS 67214
Shannon S. Krysl, Administrative Law Judge
George Gomez, Director